

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JOHN M. DOWNES and DEPARTMENT OF THE ARMY,  
ARMY CORPS OF ENGINEERS, Philadelphia, PA

*Docket No. 99-115; Submitted on the Record;  
Issued September 15, 2000*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for authorization of spinal fusion surgery.

The Board has duly reviewed the case record and finds that the case is not in posture for decision due to an unresolved conflict in medical opinion evidence. Further development of the medical evidence is required.

On March 30, 1996 appellant, then a 36-year-old dragtender, sustained an injury to his lumbar spine while attempting to pull a heavy sea turtle trap from the water in the performance of his duties for the employing establishment. The Office initially accepted that appellant sustained a lumbar sprain, later expanded its acceptance to include a moderate herniated nucleus pulposus (HNP) at L4-5 and a mild HNP at L5-S1, and authorized appropriate benefits.

On January 8 and February 25, 1997 Dr. Curtis W. Slipman, a Board-certified physiatrist and treating physician, recommended that appellant undergo spinal fusion, as more conservative measures, such as epidural steroid injections, had failed to give appellant any relief from his low back pain.

Appellant also submitted reports dated November 12 and December 9, 1997 from Dr. Kailash K. Narayan, a treating physician and a Board-certified neurological surgeon, who recommended that appellant undergo a posterior lumbar interbody fusion. Dr. Narayan stated that appellant had severe low back pain, secondary to L4-5 and L5-S1 internal disc rupture, and that all conservative treatment options had been exhausted.

On January 12, 1998 the Office scheduled a second opinion examination with Dr. Andrew J. Gelman, an osteopath and Board-certified orthopedic surgeon.<sup>1</sup> Following his review of the record and the statement of accepted facts, and his reexamination of appellant, Dr. Gelman stated, in a report dated March 6, 1998, that the musculoskeletal examination was without objective neurological compromise noting intact motor, sensory and reflex assessment, and no radiculopathy into the lower extremities. Dr. Gelman further opined that appellant's low back symptoms are consistent with disc abnormalities at the L4-5 and L5-S1 levels, but concluded that taking into account his prior and current findings and the evaluations by appellant's treating physicians, surgical intervention is probably not in appellant's best interest and that he would discourage this particular approach.

Appellant subsequently submitted a medical report dated July 16, 1998 from Dr. Philip C. LaTourette, a treating physician Board-certified in anesthesiology, internal medicine and pain management, who stated that there was little else that nonsurgical techniques could offer appellant and that he had reached maximum medical improvement without surgery. Dr. LaTourette concluded that without surgical intervention, he did not expect appellant to completely recover.

By decision dated August 27, 1998, the Office denied authorization of the recommended lumbar spinal fusion surgery.

With regard to prospective surgical authorization, section 8103(a) of the Federal Employees' Compensation Act provides for furnishing to an injured employee "the services, appliances and supplies prescribed by a qualified physician" which the Office "considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation."<sup>2</sup> The Board has found that the Office has great discretion in determining whether a particular type of treatment is likely to cure or give relief.<sup>3</sup>

In this case, the opinion of the Office second-opinion physician, Dr. Gelman, is in disagreement with appellant's physicians, Drs. Slipman, Narayan and LaTourette, who support surgical intervention. The Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." Consequently, the case will be remanded so that the Office may refer appellant, together with a statement of accepted facts, questions to be answered, and the complete case record, to an appropriate Board-certified specialist for an impartial medical examination and a

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<sup>1</sup> Dr. Gelman had previously acted as an impartial medical specialist in this case, in order to resolve a conflict in medical opinion on the issue of whether appellant continued to have residuals from his employment injury. In his prior report dated May 16, 1997, although surgery had not yet been recommended or requested by appellant's treating physicians, Dr. Gelman stated that, as appellant's physical examination did not demonstrate a typical radiculopathy into either lower extremity, he would be reluctant towards surgical intervention.

<sup>2</sup> 5 U.S.C. § 8103(a).

<sup>3</sup> *James E. Archie*, 43 ECAB 180 (1991); *Daniel J. Perea*, 42 ECAB 214 (1990); *William F. Gay*, 38 ECAB 599 (1987).

rationalized medical opinion to resolve the medical conflict regarding whether surgical intervention is appropriate and should be authorized in this case.

Therefore, the decision of the Office of Workers' Compensation Programs dated August 27, 1998 is hereby set aside and the case is remanded for further action in accordance with this decision and order of the Board.

Dated, Washington, DC  
September 15, 2000

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Valerie D. Evans-Harrell  
Alternate Member